

United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant.

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Brief for Appellant

Appeal from the United States District Court for
the District of Oregon

RANDALL B. KESTER,
MAGUIRE, SHIELDS, MORRISON & BAILEY,
723 Pittock Block,
Portland 5, Oregon,
Attorneys for Appellant.

FILED

DEC 26 1951

PAUL P. O'BRIEN
CLERK

INDEX

	Page
Jurisdiction	1
Statement of the Case	2
The Facts	2
The Controversy	6
Specifications of Error	7
Argument	14
Summary of Argument	14
The Policy Provisions	16
The Problem of Primary and Excess Coverage	20
I —The U. S. F. & G. policy, being prior in date, is primary	23
II —The U. S. F. & G. policy is more specific, and therefore primary	26
III —The accident having been caused by the named insured of U. S. F. & G., it should be primarily responsible	28
IV —The U. S. F. & G. owed the primary duty of defense to its own named insured	32
Other Cases	34
Conclusion	37

TABLE OF AUTHORITIES

Statutes

	Page
28 U.S.C. §1291	2
28 U.S.C. §1332	2
28 U.S.C. §2201	2

INDEX—(Continued)

Cases

	Pages
American Auto Ins. Co. v. Penn. Mutual Indem. Co., 161 F. (2d) 62 (3rd Cir., 1947)	15, 28, 29, 35
Astoria v. Astoria & Col. R. Ry., 67 Or. 538, 136 Pac. 645 (1913)	25
Auto Ins. Co. of Hartford v. Springfield Dyeing Co., 109 F. (2d) 533 (3rd Cir., 1940)	15, 25
Brown v. Fields, 160 Or. 23, 83 P. (2d) 144 (1938)	25
Commercial Cas. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934)	15, 30
Continental Cas. Co. v. Curtis Pub. Co., 94 F. (2d) 710 (3rd Cir., 1938)	16, 33, 35
Grasberger v. Liebert and Obert, 335 Pa. 491, 6 A. (2d) 925 (1939)	35
Gutner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700 (2d Cir., 1929)	15, 25
Hartford Steam Boiler Insp'n & Ins. Co. v. Cochran Oil Mill Co., 26 Ga. App. 288, 105 S.E. 856 (1921)	15, 26
Kearns Coal Corp. v. United States Fid. & Gty. Co., 118 F. (2d) 33 (2d Cir., 1941), cert. den., 313 U.S. 579	22, 30
Maryland Cas. Co. v. Bankers' Indem. Co., 51 Ohio App. 323, 200 N.E. 849 (1935)	15, 29
Michigan Alkali Co. v. Bankers' Indem. Ins. Co., 103 F. (2d) 345 (2d Cir., 1939)	14, 24
New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F. (2d) 653 (6th Cir., 1940)	14, 23, 24
Trinity Universal Ins. Co. v. Gen. Acc. F. & L. A. Corp., 138 Ohio St. 488, 35 N.E. (2d) 836 (1941)	15, 27
Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F. (2d) 717 (7th Cir., 1941)	35

Treatises

Annotation 122 A.L.R. 1204	34
Vance on Insurance, 3rd Ed., p. 96	31

United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Brief for Appellant

Appeal from the United States District Court for
the District of Oregon

JURISDICTION

This is a declaratory judgment proceeding brought by appellee, United States Fidelity and Guaranty Company, to determine the effect and applicability of two policies of liability insurance—one issued by the appellant, Oregon Automobile Insurance Company (hereinafter referred to as Oregon), and the other issued by the appellee, United States Fidelity and Guaranty Company (hereinafter referred to as U. S. F. & G.).

Jurisdiction is based upon the Federal Declaratory Judgment Act (28 U. S. C. §2201) and upon diversity of citizenship (28 U. S. C. §1332). It is stipulated that the U. S. F. & G. is a Maryland corporation (R. 48), the Oregon is an Oregon corporation (R. 48), the appellees Beulah and William Morris (husband and wife) are residents and inhabitants of the State of Washington (R. 49), and the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest, costs and attorneys' fees (R. 49).

The case was tried to the Court without a jury, and the trial court made Findings of Fact and Conclusions of Law (R. 68). The final Judgment of the District Court was entered on July 19, 1951 (R. 81), and the Notice of Appeal was filed August 13, 1951 (R. 84). Jurisdiction of this court to review the judgment is based upon 28 U. S. C. §1291.

STATEMENT OF THE CASE

The Facts

In this case substantially all of the material facts have been stipulated in the Pre-Trial Order (R. 48), and the only issues are purely legal questions as to the interpretation and application of the two insurance policies (R. 88-90).

The U. S. F. & G. issued its automobile liability policy to Ray E. Suter and/or Lela Suter, for the period June 4, 1949, to June 4, 1950, insuring them against liability for damages because of bodily injury or destruction of property arising out of the

use of a Plymouth automobile, with limits of \$5,000.00 for each person injured, \$10,000.00 for all persons injured in any one accident, and \$5,000.00 for property damage (Ex. 1, R. 92, R. 15).

The U. S. F. & G. policy also provided coverage for the Suters with respect to the use of any other automobile. The full text of its "Insuring Agreement V—Use of Other Automobiles" is set forth *infra*, pp. 16-17 (R. 16).

The Oregon issued its combined automobile policy to Houk Motor Co., Redmond Motor Co. and Redmond Tractor Co., for the period October 1, 1949, to October 1, 1950, insuring them, among other things, against liability for damages because of bodily injury or destruction of property arising out of the operation of described motor vehicles. The limits of the Oregon policy were \$100,000.00 for each personal injury, \$100,000.00 for all injuries in each accident, and \$5,000.00 for property damage (Ex. 2, R. 93).

Insofar as is material to this case, the Oregon policy also provided coverage to any other person or organization with respect to the use of any automobile otherwise covered by the policy. The full text of its extended coverage clause is set forth, *infra*, pp. 18-19 (R. 97).

Both policies contained provisions dealing with the existence of other insurance. The U. S. F. & G. policy provided, in substance, that it would pro-rate with other valid and collectible insurance, except

that with respect to the use of other automobiles, it would be excess insurance only. The applicable provision is set forth, *infra*, pp. 17-18 (R. 17-18).

The Oregon policy provided, in substance, that it would pro-rate with other valid and collectible insurance, except that as to any one other than a named insured, if such person had other valid and collectible insurance, then he would not be indemnified at all under the Oregon policy. The applicable provisions are set forth *infra*, p. 19 (R. 94-6).

The accident out of which this controversy arose occurred on October 15, 1949, when Raymond Suter (a named insured under the U. S. F. & G. policy) was driving an automobile belonging to the Redmond Motor Company (a named insured under the Oregon policy). Suter collided with an automobile owned and driven by William Morris, in which his wife, Beulah Morris, was riding. As a result of the accident Beulah Morris sustained personal injuries and William Morris sustained personal injuries and damage to his car (R. 50).

Following the accident Beulah Morris commenced an action for her personal injuries in Deschutes County, Oregon, against Raymond Suter, Houk Motor Company, and one James Stuchlik, who is not involved in this case. It will be noted that in this action the Redmond Motor Company, the owner of the car Suter was driving, was not sued, but the Houk Motor Company, another named insured under the Oregon policy, was sued (R. 50).

While the action in Deschutes County was still pending, Beulah Morris commenced another action in Marion County, Oregon, in which she sought to recover for the same injuries alleged in the Deschutes County action. In the Marion County action she sued Suter and Stuchlik only (R. 51).

Subsequently Beulah Morris abandoned and took a non-suit in the Marion County action and proceeded with the Deschutes County action, in which she finally obtained a judgment against Raymond Suter alone, in the sum of \$7,360.00 plus costs of \$114.83. The judgment was entered November 27, 1950, and draws six per cent interest. It has not been paid and is still in full force and effect (R. 50-51).

William Morris also commenced an action in Deschutes County, Oregon, in which he claimed damages for his own injuries in the amount of \$1,500.00, for property damage to his automobile in the amount of \$250.00, and for loss of consortium due to his wife's injuries in the amount of \$7,500.00, all arising from the same accident. In this action he sued Raymond Suter, Redmond Motor Company and James Stuchlik (R. 51). At the time of the trial of the case at bar, the action of William Morris was still pending (R. 52).

In both actions brought by Beulah Morris, the U. S. F. & G. undertook the defense of Suter and in so doing incurred expenses and attorneys' fees (R. 52). The Oregon participated in the Deschutes County case to the extent of defending its named

insured, Houk Motor Co., but did not participate in the Marion County action. The question was raised below whether a sufficient tender of Suter's defense had been made to Oregon, but that question is not presented here, and for the purposes of this appeal it may be assumed that a sufficient tender was made.

The Controversy

The ultimate question in this case is which policy is primary and which is excess. The U. S. F. & G. contends that the Oregon must assume all liability on behalf of Suter, both as to Beulah and as to William Morris, and in addition pay the expenses of Suter's defense incurred by U. S. F. & G. (R. 53-54).

The Oregon contends that the U. S. F. & G. policy is "other valid and collectible insurance" available to Suter, and that so long as the U. S. F. & G. has not exhausted its policy limits, Suter is not covered by the Oregon policy. The Oregon admits that when the U. S. F. & G. pays its policy limits then it ceases to be "other collectible insurance", and that Oregon would then be liable to pay any balance remaining (R. 55-58).

The Morrises of course want to collect for their damages, and no one denies that their claims would be within the coverage of one or the other of the two policies. The Morrises have presented their claims in this proceeding (R. 54), but their rights will be fully protected regardless of which policy is held to be primary.

The trial court held that the Oregon policy is primary and the U. S. F. & G. policy excess; that Oregon is required to pay all damages recovered by either of the Morrises against Suter; and it awarded judgments against Oregon for the expenses incurred by U. S. F. & G. in defending Suter, for the amount recovered by Beulah Morris against Suter, and also for attorneys' fees of Beulah Morris in the declaratory judgment proceeding (R. 78-83). From this declaration and judgment, Oregon appeals.

SPECIFICATIONS OF ERROR

The basic error of the trial court was in construing the Oregon policy as primary, and the U. S. F. & G. policy as excess, and in giving judgment accordingly, instead of holding the U. S. F. & G. policy to be primary and the Oregon policy to be excess, which appellant submits is the correct interpretation. This error appears in a number of ways in the trial court's Conclusions of Law and Judgment, and although there is some overlapping, appellant asserts that the trial court erred as a matter of law in each of the matters asserted in appellant's Statement of Points (R. 187-194), which are as follows:

1. The trial court erred in making and entering its conclusion of law No. I, which was as follows, to-wit:

"That the Oregon Automobile Insurance Company by virtue of its policy of insurance Pre Trial Ex. 2, did insure and cover Raymond

Suter and did protect him against legal liability for damages arising out of the accident which occurred on the 15th day of October, 1949, between the Mercury automobile which he was driving and that driven by William Morris, in Deschutes County, Oregon" (R. 78, 187).

2. The trial court erred in making and entering its conclusion of law No. II, which was as follows, to-wit:

"That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand (\$100,000.00) Dollars, and costs of defense" (R. 78, 188).

3. The trial court erred in making and entering its conclusion of law No. III, which was as follows, to-wit:

"That the policy of the Oregon Automobile Insurance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company 'Pre Trial Ex. I', is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until

the Oregon Automobile Insurance Company had expended the full amount of its coverage" (R. 78-9, 188).

4. The trial court erred in making and entering its conclusion of law No. IV, which was as follows, to-wit:

"That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Thousand Four Hundred Seventy-Four and 83/100 (\$7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950" (R. 79, 188-9).

5. The trial court erred in making and entering its conclusion of law No. V, which was as follows, to-wit:

"That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty (\$250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit" (R. 79, 189).

6. The trial court erred in making and entering its conclusion of law No. VI, which was as follows, to-wit:

"That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Hundred Forty-five and 83/100 (\$745.83) Dollars, together with interest thereon at the rate of (6%)

Six per cent per annum from the 26th day of December, 1950" (R. 79-80, 189).

7. The trial court erred in making and entering its conclusion of law No. VII, which was as follows: to-wit:

"That Beulah Morris is not entitled to any recovery from the plaintiff the U. S. Fidelity and Guaranty Company" (R. 80, 189-190).

8. The trial court erred in making the following determination and declaration in its judgment and decree dated July 19, 1951, to-wit:

"That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is required to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the county of Deschutes, State of Oregon" (R. 81-2, 190).

9. The trial court erred in making and entering the following determination and declaration in its judgment and decree dated July 19, 1951, to-wit:

"That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed

and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and that the plaintiff, United States Fidelity and Guaranty Company is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely \$100,000.00" (R. 82, 190-1).

10. The trial court erred in awarding judgment against the Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$7,360.00, plus costs in the sum of \$114.43, together with interest on the said sums at the rate of 6% per annum from the 27th day of November, 1950 (R. 82, 191).

11. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$250.00 attorneys' fees (R. 83, 191).

12. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the plaintiff United States Fidelity & Guaranty Company for the sum of \$745.83, together with interest thereon at the rate of 6% per annum from the 26th day of December, 1950 (R. 83, 191).

13. The trial court erred in refusing to grant judgment in favor of the defendant Beulah Morris and against the plaintiff United States Fidelity and Guaranty Company (R. 83, 191).

14. The trial court erred in refusing to hold that with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom (R. 191-2).

15. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance (R. 192).

16. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company was not and is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action

for personal injuries to said William Morris or the cause of action for property damage of said William Morris, nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris until plaintiff has exhausted the limits of its policy of insurance (R. 192).

17. The trial court erred in refusing to hold that plaintiff herein was and is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance (R. 193).

18. The trial court erred in refusing to hold that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784 in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy (R. 193).

19. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to the plaintiff in any amount (R. 193).

20. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the

limits of liability of its insurance as to the judgment in her favor in Deschutes County (R. 193).

21. The trial court erred in refusing to hold that neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys' fees in this cause from the Oregon Automobile Insurance Company (R. 193).

22. The trial court erred in refusing to hold that the policy of plaintiff was and is valid and collectible insurance available to and covering said Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company (R. 193-4).

23. The trial court erred in refusing to hold that the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident (R. 194).

ARGUMENT

Summary of Argument

1. As between two policies, either of which would apply in the absence of the other, the policy of earlier date is primary, and the later policy is excess.

New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F. (2d) 653 (6th Cir., 1940);

Michigan Alkali Co. v. Bankers' Indem. Ins. Co., 103 F. (2d) 345 (2nd Cir., 1939);

Gutner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700 (2d Cir., 1929);

Auto Ins. Co. of Hartford v. Springfield Dyeing Co., 109 F. (2d) 533 (3rd Cir., 1940).

2. Where there is a garage liability policy covering a number of risks, including the operation of automobiles owned by the garage, and an individual driver has a policy covering his operation of automobiles, the garage policy is general and the individual policy is specific, so that as between them the individual policy is primary.

Hartford Steam Boiler Insp'n. & Ins. Co. v. Cochran Oil Mill Co., 26 Ga. App. 288, 105 S.E. 856 (1921);

Trinity Universal Ins. Co. v. Gen. Acc. F. & L. A. Corp., 138 Ohio St. 488, 35 N.E. (2d) 836 (1941).

3. Where the driver is the actual tortfeasor, and the owner is either not liable in tort or only secondarily liable, the company whose named insured is the driver is the primary insurer.

American Auto Ins. Co. v. Penn. Mutual Indem. Co., 161 F. (2d) 62 (3rd Cir., 1947);

Maryland Cas. Co. v. Bankers' Indem. Co., 51 Ohio App. 323, 200 N.E. 849 (1935);

Commercial Cas. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934).

4. Regardless of which policy is primary as to the ultimate liability, an insurer owes the primary duty of defense to its own named insured.

Continental Cas. Co. v. Curtis Pub. Co., 94 F. (2d) 710 (3rd Cir., 1938).

The Policy Provisions

The portion of the U. S. F. & G. policy which provides coverage for Suter while driving the car owned by Redmond Motor Company is found in "Insuring Agreement V—Use of Other Automobiles." That agreement is as follows:

"V Use of Other Automobiles

If the Named Insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, *such insurance* as is afforded by this policy with respect to said automobile *applies with respect to any other automobile*, subject to the following provisions:*

- (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'Insured' includes
 - (1) such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such

* All italics herein supplied unless otherwise indicated.

other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

- (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the Named Insured or a member of his household other than a private chauffeur or domestic servant of the Named Insured or spouse;
- (2) to any automobile while used in the business or occupation of the Named Insured or spouse except a private passenger automobile operated or occupied by such Named Insured, spouse, chauffeur or servant;
- (3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;
- (4) under coverage C, unless the injury results from the operation of such other automobile by such Named Insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such Named Insured or spouse.” (R. 16.)

The U. S. F. & G. clause dealing with other insurance is found in paragraph 12 of the conditions, which provides as follows:

“12. Other Insurance—Coverages A and B

If the Insured has other insurance against

a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the Insured*, either as an Insured under a policy applicable with respect to said automobiles or otherwise.” (R. 17-18).

The provision of the Oregon policy which extended coverage to Suter while driving the car owned by Redmond Motor Company is a part of Endorsement #3, and so far as material here, it provides as follows:

“It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies subject to the following provisions:

* * *

“2. To *any other person or organization*, as insured, provided:

the insurance applies only if the named insured’s operations are classified as ‘automobile dealer or repair shop’ and only with respect to the use, for such business operations or for pleasure purposes, of any auto-

mobile covered under such classification." (R. 97).

The "Other Insurance" clause of the Oregon policy appears in paragraph 11 of the Conditions, and is as follows:

"11. Other Insurance. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Warranties bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph 'DRIVE OTHER PRIVATE PASSENGER AUTOMOBILES' shall be excess insurance over any other valid and collectible insurance available to the Insured either as an Insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph, and *further this Company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.*" (R. 95-6).

It will be noted that the "Additional Assured" clause of the basic Oregon policy (bottom of page R. 94) contains provisions similar to those just quoted. That is, the insurance applies to "any per-

son while legally operating any automobile described . . .", and it is expressly provided that "any Additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy" (R. 94-5).

While the general language of the "Additional Assured" clause may be superseded by the more specific garage liability endorsement, the effect for the purposes of this case is just the same. That is, if anyone other than the named insured has other valid and collectible insurance available under any other policy, then he is not covered by the Oregon policy.

The effect of the "other insurance" clause in each policy is the same as in the other. Although the Oregon policy says that anyone other than the named insured is not covered at all in the event of other insurance, the effect is the same as if it had said it would be excess only, for as soon as the limits of the other policy are exhausted then the other ceases to be "collectible" and the Oregon policy could then be invoked, as excess coverage.

The Problem of Primary and Excess Coverage

The Court will observe that if both policies were taken literally, then there would be an impasse. Either policy would cover, in the absence of the other, but each policy would be suspended so long as the other one exists. To give effect to both "other insurance" clauses would be to nullify both policies.

Since the personal injury claimants are obviously entitled to protection under one or the other, some way must be found to determine which policy is primary and which is secondary. Such a decision will necessarily do violence to the "other insurance" clause in one policy or the other, and the court is faced with the difficult problem of deciding which policy must be sacrificed in order to give effect to the other.

In struggling with this problem the courts have found it difficult to avoid circuitry of reasoning. Unfortunately some courts have passed it off by merely assuming that one policy or the other is primary, without expressing any reasons, and such decisions are of little help. From those cases which attempt to analyze the question, the following principles can be gleaned:

- (1) The policy of prior date is ordinarily primary, since at the time of its issuance there is no "other insurance", and when the subsequent policy attaches it covers only what the former policy omits.
- (2) As between policies of different character the one which relates more specifically to a given risk is primary, and one which includes that risk only generally is secondary.
- (3) Where each policy has a different named assured, each insurer is primarily responsible for losses caused by its named assured and only

secondarily responsible for others who are incidentally covered.

When these factors occur in different combinations, the results are sometimes hard to predict. However, in the present case all of these reasons point in the same direction and operate to make the U. S. F. & G. policy primary and that of the Oregon secondary or excess only.

In *Kearns Coal Corp v. United States Fidelity & Guaranty Co.*, 118 F. (2d) 33 (2d Cir., 1941), cert. den. 313 U.S. 579, where the defendant was the same insurance company as is plaintiff here, that company insured the truck owner with an omnibus clause having the same provision that the Oregon policy has in this case, excluding coverage for an additional assured who has other valid and collectible insurance. The Travelers Insurance Company by a prior policy insured the user of the truck with respect to hired automobiles, with a provision limiting its coverage to excess only, just like the plaintiff's policy here. The U. S. F. & G. in that case asserted the same proposition which it is denying in this case—namely that the owner's policy did not apply because the operator's policy was other valid and collectible insurance. While the court placed its decision on other grounds, its discussion of this problem is helpful:

“These clauses, as the precedents show, afford excellent opportunity for circular reasoning: if or since Fidelity is not bound, Travelers is; and

vice versa. In view of what we have held above, we need not decide this troublesome issue further than to say that of the several theories extant two at least favor the defendant: one that *the policy date controls* and defendant's policy, being later in date, though seemingly a renewal of some earlier policy, covers only what the Travelers policy did not cover; and the other that, since protection of the named assured was the chief purpose of each contract, *each insurer should bear primary responsibility for losses of his named assured and only secondary responsibility, after primary funds have failed, for other losses.*" (118 F. (2d) 33, 35; italics supplied.)

I.

The U. S. F. & G. policy, being prior in date, is primary.

The undisputed facts are that the U. S. F. & G. policy was issued for the year commencing June 4, 1949 (Ex. 1, R. 92, 15), and the Oregon policy was issued for the year commencing October 1, 1949 (Ex. 2, R. 93). The accident happened October 15, 1949 (R. 50). At the time the U. S. F. & G. policy was issued there was no other insurance available under the Oregon policy because it did not exist.

In the case of *New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co.*, 108 F. (2d) 653 (6th Cir., 1940), there was a leased vehicle involved. The lessor had a policy with the Hartford which extended coverage to any permissive driver, as an additional assured, but which excluded coverage if

such additional assured had other insurance (the same type of provisions as in Oregon's policy here). The lessor's policy as originally issued excluded coverage while the vehicle was rented to others, but by subsequent endorsement it had been extended to cover the particular vehicle involved in the case. The lessee in the meantime had obtained a policy from the Amsterdam which covered the operation of all automobiles by the named assured, and which provided that it would be excess only if the owner of the vehicle had other insurance (the same type of provision as in the U. S. F. & G. policy here). Since the lessee's policy was in effect prior to the endorsement on the lessor's policy (both being in effect at the time of the accident), and the lessee was solely responsible for the accident, the court held the lessor's policy was not the primary insurance. The lessor in that case was in the same position as the Redmond Motor Co. in this case, and the lessee was in the same position as Suter in this case.

In *Michigan Alkali Co. v. Bankers' Indem. Ins. Co.*, 103 F. (2d) 345 (2d Cir., 1939), the facts were reversed from the *New Amsterdam* case in that the owner's policy had been issued first and the lessee-operator's policy was later in date. Consequently the court held the owner's earlier policy to be primary, which is consistent with the *New Amsterdam* case. The court also points out that under New York statutes the owner would be liable for the negligence of the renter if it did not carry liability insurance covering the renter, and that as a term of the

lease the owner had agreed to carry insurance covering the renter. This was an additional reason for holding the owner's insurance to be primary.*

In *Gutner v. Switzerland General Ins. Co.*, 32 F. (2d) 700 (2d Cir., 1929), two separate policies of cargo insurance had been obtained covering goods in transit. Each contained a clause providing that it was to be excess only, over any other insurance. The court held that the first policy issued was the primary insurance, since at the time of its issuance there was no other insurance in effect, and denied recovery against the second insurer except for the excess.

The rule of prior insurance being primary was also invoked in *Auto Ins. Co. of Hartford v. Springfield Dyeing Co.*, 109 F. (2d) 533 (3rd Cir., 1940), where a bailee's policy insuring against damage to goods in its possession was issued prior to a policy taken out by the bailor, and the goods were stolen while in the bailee's possession. Each policy provided that it would be excess over other insurance, and the bailee's prior policy was held to be primary.

The result of the foregoing decisions from the Second, Third and Sixth Circuits, would be to make the prior U. S. F. & G. policy primary in this case and the later Oregon policy excess only.

* Under Oregon law the owner is not liable for the negligence of a bailee, in the absence of agency, *Brown v. Fields*, 160 Or. 23, 83 P. (2d) 144; but if liability could be imposed vicariously on the owner his liability would be secondary, and he could have indemnity from the primary tort-feasor, *Astoria v. Astoria & Col. R. Ry. Co.*, 67 Or. 538, 136 Pac. 645.

II.

The U. S. F. & G. policy is more specific, and therefore primary.

It will be observed that the U. S. F. & G. policy provides only automobile liability and medical coverage (R. 15). The Oregon policy however provides a variety of coverages to its named insureds, including automobile liability; general garage liability for all work necessary to the conduct of the named insureds' business, both on and off the premises; cargo insurance for goods in custody of the insureds as common carriers; public liability coverage for operations under permit of the Oregon Public Utilities Commissioner; damage to property of the insureds themselves caused by collision of a hoist with any other object; fire, collision and related insurance for vehicles carried or towed by the insureds; liability insurance for hoist collisions; and blanket coverage for additional interests in connection with garage operations (R. 93-106).

Comparison of the two policies shows that the U. S. F. & G. policy is much narrower and more limited in scope than the Oregon's, and it follows that the U. S. F. & G. policy is the more specific. The only risks it assumed are of the precise type involved in this case—i.e. automobile operations—whereas the Oregon undertook a broad, general coverage including many risks not here involved.

In Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill Co., 26 Ga. App. 288, 105 S.E.

856 (1921), the Georgia Casualty Co. had issued a policy of employers liability insurance to the Cochran Company, and the Hartford had issued a policy of boiler insurance to the same insured which covered (1) property damage, and (2) liability for personal injuries, as a result of boiler explosion. Each policy provided that it would be excess in the event of other insurance. An employee of Cochran Company was injured in a boiler explosion, and each company denied liability on the ground that it was excess only. The court discussed the question of "primary" and "excess" insurance at length, and concluded that the Georgia policy, being more limited in scope, was more specific and hence primary; and the Hartford policy, which covered a greater variety of risks, was more general and therefore excess.

The same rule was employed in *Trinity Universal Ins. Co. v. General Acc. F. & L. A. Corp.*, 138 Ohio St. 488, 35 N.E. (2d) 836 (1941), where the General issued a policy covering the liability of the assured as a result of an accident on the premises, but providing that it would be excess over any other insurance if the accident was due to an automobile. The Trinity issued a policy to the same assured covering liability from operation of a truck, and providing that it would not be liable for more than a pro rata share with other insurance. An accident having occurred with the truck, on the premises, the court held that the policy covering any injuries on

the premises was the more general, and the specific insurance on the truck was primary.

Under the foregoing reasoning, appellant submits that the more specific U. S. F. & G. policy should be primary and the more general Oregon policy should be excess.

III.

The accident having been caused by the named insured of U. S. F. & G., it should be primarily responsible.

It will be recalled that at the time of the accident Raymond Suter, who was U. S. F. & G.'s named assured, was driving a car owned by Redmond Motor Company, Oregon's named assured (R. 50). There is no claim here that Redmond was in any way responsible for, or legally liable for, any negligence of Suter. As pointed out above, under Oregon law an owner is not liable for negligence of a mere bailee (footnote, page 25, *supra*).

In *American Auto Ins. Co. v. Penn Mutual Indem. Co.*, 161 F. (2d) 62 (3rd Cir., 1947) the tort feasor, Wasilindra (like Suter in this case), was driving a borrowed automobile belonging to one Pender (like Redmond Motor Co. in this case). Wasilindra had a driver's policy with American Auto which covered him while driving any car, but which was provided to be excess only if there was other insurance on the car (like the U. S. F. & G. policy here). The owner, Pender, had a policy which extended coverage to any permissive driver, but which did not apply to any person who had other valid or col-

lectible insurance (like the Oregon policy in this case). The driver's insurer, having been compelled by garnishment to pay the injured persons, sued the owner's insurer for reimbursement. The court, through Judge Goodrich, held that the driver's insurer was primarily responsible and denied the claim for reimbursement.

The *American Auto* case seems directly in point here. The same policy provisions were involved as in this case, and the two companies were in the same relative positions as here, except that the driver's insurer there had been required by the Financial Responsibility Act to pay the judgment in the first instance. As pointed out in the opinion however, the effect of the Financial Responsibility Act was merely with respect to the injured person and not between the companies. The court lays considerable stress on the fact that Wasilindra, plaintiff's insured, was the actual tort feasor, and that the owner of the car was not liable to the injured person, just as in the present case.

In the case of *Maryland Casualty Co. v. Bankers Indemnity Co.*, 51 Ohio App. 323, 200 N.E. 849 (1935), there was a hired truck involved. The owner was insured by the Bankers with a policy extending coverage to permissive operators but which excluded coverage for any one other than the named assured who had other valid and collectible insurance (as the Oregon policy here). The lessee-operator had a policy with the Maryland which cov-

ered hired vehicles, but which provided that it would be excess only if the hired equipment had other insurance (as the U. S. F. & G. policy here). The accident occurred as the result of operation of the truck by the lessee, and the court held that the operator's policy was primary and the owner's policy was excess.

In *Commercial Cas. Co. v. Hartford Acc. & Ind. Co.*, 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934), an accident had occurred involving a truck owned by one Strom, an independent contractor, and operated by his driver, while on business for a general contractor, Hanlon & Oakes. Strom had a policy with the Commercial which covered anyone legally responsible for the use of the automobile, but which excluded coverage for any additional assured who had other insurance. The Hartford had insured the general contractors, Hanlon & Oakes, with respect to the use of automobiles owned by independent contractors, but not covering the operators of such vehicles. The Hartford policy provided that it was only excess over any owner's or operator's insurance which covered their named assured. The facts of the accident admittedly made the general contractors liable to the injured person, but the primary liability was on Strom, and the liability of Hanlon & Oakes was only secondary. The court therefore held that Strom's insurance was primary and that of the general contractor only secondary.

These cases illustrate what Judge Clark meant in the *Kearns* case, quoted *supra*, when he said that

"each insurer should bear primary responsibility for losses of his named assured" (118 F. (2d) at 35).

In this case, the Oregon never at any time had any contractual relationship with Suter, and the fact that Suter might become an additional assured under the Oregon policy by driving Redmond's car was purely incidental to the main purpose of the Oregon policy, which was to protect its own named assureds.

On the other hand, protection of Suter was the principal purpose of the U. S. F. & G. policy. It was the only company that knew Suter, the company that could examine his driving record, that could charge a premium based upon his desirability as a risk, and which after evaluating all such factors had deliberately chosen to underwrite him as a driver. It is elementary that insurance is a highly personal contract,* and liability insurance is especially so.

Here, the Oregon had no choice, no opportunity to consider Suter as an individual, or to base a premium upon his desirability. He was merely one of an indefinite class of persons that might or might not be driving cars owned by Redmond Motor Co. Reference to the Oregon policy will show that its premium was based upon the payroll of the insured garages, with no consideration even of the number of vehicles owned (R. 106).

* See, e.g., *Vance on Insurance*, 3rd Ed., p. 96, *et seq.*

This is not said in any sense to negate Oregon's coverage for Suter if there had been no other insurance. But the actuarial basis for such incidental coverage to additional assureds necessarily assumes that most drivers will have their own primary insurance. This is shown by the very clause in question, which says that any additional assured who has other insurance will not be covered under the Oregon policy. If the Oregon were to undertake primary coverage for each person who might be driving one of the garage's automobiles, then obviously it would need some sort of a premium reflecting that exposure.

In short, the U. S. F. & G. had a premium to cover the particular risk of Suter's driving, and the Oregon did not. Surely as between the two companies, when the rights of the injured person will not be prejudiced, the primary risk should fall on the company which undertook to insure the particular driver as an individual.

IV.

The U. S. F. & G. owed the primary duty of defense to its own named insured.

As a part of its claim in this case, U. S. F. & G. seeks to be reimbursed for the sum of \$745.83 which it paid to its own attorneys for the defense of its own named insured, and the trial court so held. Appellant submits that such recovery is unjustified, even though it were to be decided that under the circum-

stances here the Oregon policy was primary as to the ultimate liability.

Each policy contains comparable provisions requiring each company to defend its insured even if such suit is groundless. The defense provision in the U. S. F. & G. policy is Insuring Agreement II (R. 16), and that in the Oregon policy is labelled "Additional Coverage" in the conditions (R. 94).

The duty of defense is a direct, contractual obligation, which neither company can avoid as to its own named insured. Plaintiff recognized this, and it is significant that it did not make any demand on or tender to the Oregon until long after the actions were filed, and after it had already appeared in the cases on behalf of its named insured.*

The Oregon has at all times been willing to defend its own named insureds, and did in fact defend Houk Motor Company in the Deschutes County case (Ex. 12, R. 118; Ex. 23, R. 140).

In *Continental Cas. Co. v. Curtis Pub. Co.*, 94 F. (2d) 710 (3rd Cir., 1938) the Continental had insured one Meadows, an employee of Curtis, with respect to his personal car, with an omnibus clause covering his employer, but excluding coverage if the addi-

* The record does not show just when the first action was filed in Deschutes County, but it must have been before July 8, 1950, because Brewster says in his letter of that date that he has been employed by General Adjustment Bureau to defend Suter (Ex. 23, R. 140). The General Adjustment Bureau represented U. S. F. & G. (R. 180). The first demand by U. S. F. & G. to Oregon was dated Sept. 5, 1950, and it referred only to the Marion County action (Ex. 11, R. 115). No demand was made with respect to the Deschutes County action until Nov. 7, 1950, which was less than two weeks prior to trial (Ex. 14, R. 125).

tional insured had other valid and collectible insurance. The American Co. had insured the employer, Curtis, against non-ownership liability, with a provision that its coverage was to be excess. The employee had an accident in the course of his business, resulting in lawsuits against both him and his employer. Continental undertook the defense of its insured, Meadows, but refused to defend Curtis. The American defended Curtis, its named insured, and paid the expenses of defense. Curtis then sought indemnity from Continental, including the cost of defense. The court held that Continental's policy was primary and American's was excess (the actual tort-feasor was Continental's named assured), but it denied reimbursement for the cost of defense on the ground that even though American's liability was secondary as to the injured persons, it owed a direct duty of defense to its own named insured.

Since Oregon had no contract with Suter, and any rights Suter might have under the Oregon policy are purely incidental, whereas U. S. F. & G. had a direct contractual obligation to defend Suter, appellant submits that U. S. F. & G. cannot shift its cost of defending its own named insured to Oregon, regardless of what rights the injured persons might have against Oregon.

Other Cases

As pointed out at the beginning of this Argument, the courts have had some difficulty with the problem of primary and excess coverage, and the cases are not uniform. See Annotation 122 A.L.R. 1204. We be-

lieve that the foregoing analysis will serve to reconcile most of the decisions. Some of the cases which are occasionally cited on the general question are not in point on the issue here.

For example in *Grasberger v. Liebert and Obert*, 335 Pa. 491, 6 A. (2d) 925 (1939), which is the subject of the above annotation, both the owner of the truck and the lessee were held to be in control of the truck and hence jointly liable to the injured person. This distinguishes it from the present case where the only tort liability was on the part of Suter, the named insured of U. S. F. & G.

In *Continental Cas. Co. v. Curtis Pub. Co.*, discussed *supra* on the question of obligation to defend, the driver was the actual tort feasor and his employer was only vicariously liable. The holding that the employee's insurer was primarily responsible for the employer, as against the employer's own insurer, is therefore consistent with the cases cited under Point III, *supra*, and particularly the later decision of the same court in *American Auto v. Penn. Mutual, supra*.

The case of *Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor*, 124 F. (2d) 717 (7th Cir., 1941) employs a line of reasoning that does not seem to be used in other cases. In that case the owner, Dottini, was insured with Zurich, under a policy issued March 11, 1939, with an omnibus clause that excluded coverage if the additional assured had other insurance. The driver, Clamor, had his own policy with the

Car & General which, by endorsement dated June 7, 1939, covered his use of other cars, provided that the latter coverage was excess only. The court argues that the risk under both policies attached at the same time, i.e. when Clamor drove Dottini's car with permission, and puts its decision on the ground that the driver's policy used more specific language in its exclusion than did the owner's and it therefore should enforce the exclusion in the driver's policy rather than that in the owner's. With respect to this decision we have these principal observations:

1. Although the court does not put its decision on that ground, the result was that the coverage which was *issued* first, was primary.
2. The court says that specific language is to be enforced, in preference to general, which is consistent with the cases cited *supra*, Point II.
3. In that case the nature of the coverage was identical, i.e. each policy was for automobile liability only—and neither policy had more general *coverage* than the other. In the absence of any difference in the overall scope of the policy, the "specific-general" rule was applied merely to the exclusionary language. This does not conflict with the cases which hold—as in the present case—that the policy of narrower scope should be responsible before the policy which covers a greater variety of risks.

CONCLUSION

In this field of law a practical approach to the problem is essential. The strict language of one or the other of the two policies must be sacrificed, and the question of which policy shall prevail requires a common sense solution.

This court judicially knows that the hazards of automobile accidents are always related directly to the particular driver, but are seldom, or only remotely, related to the car he happens to be driving. When one company has undertaken to insure the particular *driver*, no matter what car he is using, and another company has undertaken to insure the *vehicle*, no matter who is driving, the one which insured the particular driver should be primarily liable.

Such a result would follow in this case from the application of any one of the three rules mentioned above, and when all three lead to the same result, the conclusion seems inescapable.

Respectfully submitted,

RANDALL B. KESTER,
MAGUIRE, SHIELDS, MORRISON
& BAILEY,

Attorneys for Appellant,
723 Pittock Block,
Portland 5, Oregon.

